

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

RICHARD SCOTT,

Plaintiff,

v.

MARK SELING, et al.,

Defendants.

Case No. C05-5760RJB

ORDER ADOPTING REPORT  
AND RECOMMENDATION AND  
DISMISSING CASE

This matter comes before the Court on consideration of the Report and Recommendation of the Magistrate Judge. Dkt. 11-1. The Court has considered the relevant documents, including Plaintiff's objections, and the file herein.

**I. FACTS**

On January 5, 2006, Plaintiff, a resident of the Special Commitment Center (SCC), filed a civil rights complaint against several defendants. Dkt. 10. Plaintiff, who is proceeding *in forma pauperis*, contends that he did not receive a sexually violent predator ("SVP") evaluation in a timely manner and challenges his civil commitment. Plaintiff seeks monetary damages.

On January 6, 2006, U.S. Magistrate J. Kelley Arnold issued a Report and Recommendation, recommending that the action be dismissed because Plaintiff's claims are barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). Dkt. 11-1.

On January 12, 2006, Plaintiff filed Objections to the Report and Recommendation, contending that he has stated a claim against his defense attorneys, in essence, because his counsel was constitutionally ineffective. Dkt. 13.

## 1 **II. DISCUSSION**

### 2 **A. Legality of Confinement and Right to an Evaluation**

3 Plaintiff contends that, as a result of the actions of the Defendants, he is being unlawfully detained  
4 under RCW 71.09, in violation of his constitutional rights.

5 A claim that relates to the fact and duration of confinement is not cognizable in a civil rights action  
6 unless an inmate can demonstrate that the conviction or sentence has already been invalidated. *Heck v.*  
7 *Humphrey*, 512 U.S. 477 (1994). The proper avenue to challenge the fact or duration of confinement is to  
8 file a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973). *See Wilkinson v. Dotson*, 125  
9 S.Ct. 1242, 1248 (2005) (“a state prisoner’s § 1983 action is barred (absent prior invalidation)--no matter  
10 the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct  
11 leading to conviction or internal prison proceedings)--if success in that action would necessarily  
12 demonstrate the invalidity of confinement or its duration”). *Emphasis in the original. Heck v. Humphrey*  
13 applies to persons detained as sexually violent predators who have access to habeas relief. *Huftile v.*  
14 *Miccio-Fonseca*, 410 F.3d 1136, 1140 (9<sup>th</sup> Cir. 2005). Before a petition for writ of habeas corpus may be  
15 brought in federal court, state remedies must be exhausted. *Rose v. Lundy*, 455 U.S. 509 (1982).

16 Plaintiff’s claims alleging that his confinement as a sexually violent predator is illegal due to the  
17 conduct of the Defendants are challenges to the fact or duration of his confinement. He has not  
18 demonstrated that his detention has been invalidated; in fact, Plaintiff is currently detained at the SCC,  
19 allegedly as a result of the criminal and civil commitment proceedings he contends were unlawful.  
20 Plaintiff’s claims for injunctive relief and damages should be dismissed as barred by *Heck v. Humphrey*.

### 21 **B. Claims Against Defense Counsel**

22 Plaintiff contends that his defense attorneys were ineffective, they committed malpractice, and acted  
23 as state actors. Dkt.10, at 28. Defense counsel does not act under color of state law for purposes of  
24 actions brought under the Civil Rights Act. *See Polk County v. Dodson*, 454 U.S. 312 (1981). Allegations  
25 that a private attorney conspired with state officials may be sufficient to meet the state action requirement  
26 of Section 1983. *See Tower v. Glover*, 467 U.S. 914 (1984). However, conspiracy requires proof of an  
27 agreement to accomplish an illegal objective and the requisite intent to commit the underlying offense.  
28 *U.S. v. Mesa-Farias*, 53 F.3d 258, 260 (9<sup>th</sup> Cir. 1995). Plaintiff has not alleged sufficient facts to establish  
that his defense counsel conspired to violate his rights. Moreover, to the extent that Plaintiff is challenging

1 the effectiveness of counsel in his civil commitment proceedings, that claim would also be barred by *Heck*  
2 *v. Humphrey, supra*.

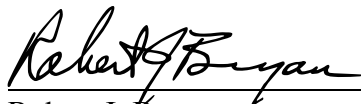
3 In addition to the foregoing reasons, neither the Complaint (Dkt.10) nor the proposed Amended  
4 Complaint (Dkt. 14) complies with Fed. R. Civ. P. 8(a) which requires a “short and plain statement of the  
5 claim[s] showing that the pleader is entitled to relief.” It is difficult to discern what claims are being made  
6 and which claims apply against which parties. Furthermore, although not grounds for dismissal, it is not  
7 clear that all the named Defendants are properly joined parties pursuant to the Federal Rules, as the relief  
8 asserted may not “arise out of the same transaction, occurrence, or series of transactions or occurrences”  
9 and may not contain “any question of law or fact common to all these persons.” Fed. R. Civ. P. 18-21.

10 Therefore, it is hereby,

11 **ORDERED** that the Report and Recommendation of the Magistrate Judge (Dkt. 11-1), is  
12 **ADOPTED**. The case is **DISMISSED WITHOUT PREJUDICE** to Plaintiff to bring these claims in a  
13 subsequent civil action upon a sufficient showing that his confinement or detention has been invalidated.

14 The Clerk of the Court is directed to send uncertified copies of this Order to all counsel of record  
15 and to any party appearing *pro se* at said party’s last known address.

16 DATED this 2<sup>nd</sup> day of March, 2006.

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19 Robert J. Bryan  
20 United States District Judge  
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